

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FABIAN IRIQUI ARMENTA,
Petitioner.

No. 2 CA-CR 2016-0333-PR
Filed December 13, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20111802001
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Paul S. Banales, Tucson
By Paul S. Banales
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 Fabian Armenta seeks review of the trial court's order denying his claim, raised pursuant to Rule 32.1(f), Ariz. R. Crim. P., that his failure to timely seek post-conviction relief after our mandate issued on appeal was without fault on his part. We will not disturb that order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Armenta has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Armenta was convicted of four counts each of armed robbery, kidnapping, and aggravated assault, and one count each of aggravated robbery, first-degree burglary, possession of a narcotic drug, and possession of drug paraphernalia. The trial court sentenced him to concurrent and consecutive prison terms that totaled more than fifty-six years. On appeal, this court vacated the criminal restitution order entered at sentencing, but otherwise affirmed his convictions and sentences. *State v. Armenta*, No. 2 CA-CR 2013-0060 (Ariz. App. Apr. 9, 2014) (mem. decision).

¶3 Our appellate mandate issued May 2014. Armenta, however, did not file a notice of post-conviction relief until February 2016. He asserted he was entitled to relief pursuant to Rule 32.1(f) because the failure to timely file was without fault on his part. The trial court appointed counsel and, based on counsel's motion, determined it would first decide whether Armenta was entitled to Rule 32.1(f) relief and, if so, it would then allow Armenta to raise additional claims under Rule 32.

¶4 Armenta filed a petition arguing he had never been advised of the thirty-day deadline for filing a notice following our

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mandate. *See* Ariz. R. Crim. P. 32.4(a). Although he acknowledged in his reply to the state’s response that he had, in fact, been so advised at the time of his sentencing, he asserted he “can hardly [be] expect[ed]” to have remembered that deadline when the appellate mandate finally issued and that it was his appellate counsel’s obligation to advise him of the deadline or file a notice on his behalf. The trial court summarily denied relief, and this petition for review followed.

¶5 On review, Armenta repeats his claim that he is entitled to file an untimely notice pursuant to Rule 32.1(f) and asserts he is entitled to an evidentiary hearing.¹ Rule 32.1(f) entitles a defendant to relief if “[t]he defendant’s failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant’s part.” But Armenta is a non-pleading defendant and thus is not seeking post-conviction relief of-right. *See* Ariz. R. Crim. P. 32.1 (“Any person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.”). Accordingly, Armenta is not eligible for relief under Rule 32.1(f). *See also State v. Diaz*, 228 Ariz. 541, ¶ 10, 269 P.3d 717, 720 (App. 2012) (recognizing that Rule 32.1(f) relief not available “for defendants [filing other than of-right petitions] . . . who share no culpability in the untimely filing of their first post-conviction” proceeding).

¶6 Although we grant review, relief is denied.

¹Armenta asserts in passing that his appellate counsel’s failure to advise him of the deadline or file on his behalf constitutes ineffective assistance of counsel. He does not meaningfully develop this argument and, in any event, it cannot be raised in an untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a); *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010) (ineffective assistance claim falls within Rule 32.1(a)). We therefore do not address it further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).